1960

The Landrum-Griffin Amendments to the National Labor Relations Act

Archibald Cox

The Landrum-Griffin Amendments to the National Labor Relations Act*

Professor Cox, who was an advisor to Senator Kennedy during the congressional consideration of labor legislation, analyzes three salient modifications of the Taft-Hartley Act included in the Labor-Management Reporting and Disclosure Act of 1959. The modifications discussed concern federal-state relations, recognition or organizational picketing, and secondary boycotts, including "hot cargo" contracts.

Archibald Cox**

The labor legislation enacted last summer deals with two principal branches of labor law: (1) the internal affairs of labor organizations, including the conduct of union officers and the rights of members, and (2) labor-management relations. The new labor-management relations law, which is the subject of this paper, is contained in amendments to the National Labor Relations Act[1] which, although less radical than the Taft-Hartley amendments,[2] nevertheless make important changes, especially in the rules governing federal and state jurisdiction, recognition or organizational picketing, and secondary boycotts.

I. Background of the Amendments

The Kennedy-Ives[3] and Kennedy-Ervin[4] bills were based upon four propositions.

First, strong independent labor unions are essential institutions in American society. The abuses revealed by the McClellan hearings tainted only a small minority.

---

* The substance of this paper was delivered as a speech before the Labor Law Section of the Minnesota State Bar Association on November 6, 1959. The author wishes to make it plain that although he has tried to achieve a measure of academic detachment, his participation in a tense legislative struggle, even if only as an adviser, probably left him with the shortcomings of a protagonist.

** Royall Professor of Law, Harvard Law School.

1. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), 29 U.S.C. § 151 (1952).

2. Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 151 (1952).

3. S. 3974, 85th Cong., 2d Sess. (1958).

4. S. 505, 86th Cong., 1st Sess. (1959).

Second, there was a demonstrated need for legislation which would check financial malpractices in union administration or labor-management relations and guarantee union members an opportunity for democratic self-government. Removing the cancer would not only safeguard union members but help to restore public confidence in organized labor. It was the duty of the federal government to take such measures because labor unions enjoyed their power by virtue of federal statutes, chiefly the National Labor Relations Act.

Third, since self-determination is preferable to government regulation, the interference with internal union affairs should be held to a minimum.

Fourth, legislation requiring internal union reforms should be kept separate from Taft-Hartley amendments. A reform bill would deal with financial reporting, accounting practices, union elections, membership requirements, the imposition of fiduciary duties upon union officials and the regulation of trusteeships and other forms of international supervision, and like subjects all of which are matters between the union, its officers and its members. Secondary boycotts, organizational picketing and other Taft-Hartley amendments would relate to union organization, collective bargaining and labor disputes, that is, to the balance of power between management and labor. If the two were confused, the need for internal reforms could all too easily be converted into an occasion for enacting amendments designed to hamper further unionization and weaken the bargaining power of existing unions vis-á-vis employers. Union members could scarcely be expected to rid themselves of corrupt officials if the cause of reform were confused with labor disputes or wages and conditions of employment.

Although the soundness of this fourth proposition seemed beyond dispute, it immediately ran into the harsh realities of Washington politics. There was no chance of enacting legislation without the support of one of the two powerful lobbies interested in labor legislation.

Business groups showed no genuine interest in reform. Spokesmen for such groups as the United States Chamber of Commerce and the National Association of Manufacturers beat the drums in an effort to swell the public outcry against the abuses revealed at the McClellan hearings in order to obtain support for laws which would strengthen the bargaining power of management in relation to labor organizations.

Large segments of organized labor opposed any legislation. Other voices in the labor movement supported a reform bill partly because they feared that more repressive legislation would otherwise be enacted and partly because they believed that reform was both in the public interest and for the long-run welfare of organized labor. How-

ever, they were either unable or unwilling to produce effective support for any bill which did not contain Taft-Hartley amendments favorable to labor. In retrospect, taking this position was a serious blunder by the labor movement. Perhaps it was also bad judgment to yield to the demand, although the ramifications of the latter question are sheer speculation.

In any event title VI was added to the Kennedy bills in order to sweeten the medicine. One section would have eliminated the "no man's land" which the NLRB declined to occupy and from which state tribunals were nevertheless excluded by Supreme Court decisions.[5] Another section would have legalized pre-hire contracts in the construction industry.[6] A third redefined the supervisors exempted from the NLRA,[7] but the Senate Labor Committee cut back this provision to a trivial definition affecting only the telephone industry.[8] The committee also added a section authorizing NLRB regional offices to hold elections after a conference with the interested parties but without a formal hearing and reference to the Board in Washington;[9] the change was intended to expedite the conduct of elections. Another amendment would have repealed the Taft-Hartley provision which denied replaced economic strikers the right to vote in NLRB elections.[10]

The Administration bill[11] adopted the substance of the Kennedy proposals concerning internal union reforms, with the many little details which could be called "tougher." The major difference was in the proposed Taft-Hartley amendments. The administration proposed to eliminate the no man's land by giving the NLRB explicit authority to decline to exercise any part of its full statutory jurisdiction and authorizing the states to take jurisdiction over the area from which the NLRB retreated.[12] The provisions dealing with organizational picketing were rather lengthy, but the net effect was an outright prohibition.[13] The Administration bill stiffened the Taft-Hartley prohibition upon secondary boycotts.[14] In addition, there were Republican "sweeteners" for organized labor, although a partisan might call them only "sugar substitutes."[15]

5. S. 505, 86th Cong., 1st Sess. § 601 (1959).
6. S. 505, 86th Cong., 1st Sess. § 603 (1959).
7. S. 505, 86th Cong., 1st Sess. § 605 (1959).
8. S. 1555, 86th Cong., 1st Sess. § 604 (1959).
9. This provision became § 605 of S. 1555, 86th Cong., 1st Sess. (1959).
10. S. 1555, 86th Cong., 1st Sess. § 603 (1959).
11. S. 748, 86th Cong., 1st Sess. (1959).
12. S. 748, 86th Cong., 1st Sess. § 502 (1959).
13. S. 748, 86th Cong., 1st Sess. § 504 (1959).
14. S. 748, 86th Cong., 1st Sess. § 503 (1959).
15. The Administration "sweeteners" provided, among other things, for prehearing elections, certification of bargaining representatives in the construction industry without an election, and voting by replaced economic strikers.

Two developments upon the Senate floor deserve notice:

(1) Picketing for union recognition or organizational purposes was prohibited for nine months after an NLRB election, and also during the period in which a contract with a rival union barred an NLRB election if the union had been lawfully recognized.[16]

(2) "Hot cargo" contracts were outlawed in the interstate trucking industry.[17]

In the House of Representatives, the real contest was between a bill reported by the Labor Committee,[18] which contained Taft-Hartley amendments resembling those passed by the Senate, and the Landrum-Griffin bill,[19] the Taft-Hartley amendments of which were drawn from the Administration bill without the "sweeteners," or with the sugar converted to vinegar. The Landrum-Griffin bill prevailed by a narrow margin.

When the Conference Committee met, it was impossible to argue that changes in the law of labor-management relations should be separated from questions of internal reform. The President's demand for Taft-Hartley amendments aroused great support. Both the House and Senate bills contained Taft-Hartley amendments, although their content was utterly dissimilar. In at least one respect, therefore, the original strategy worked out very badly. Taft-Hartley amendments dealing with restrictions upon the activities of labor unions, the very thing which Senator Kennedy had sought to avoid, were under discussion because of the ill-fated "sweeteners," although they could otherwise have been defeated. And a whole range of important subjects was excluded—revision of the organization and procedures of the NLRB, employer unfair labor practices, NLRB regulation of collective bargaining, suits to enforce collective bargaining agreements and, most notable today, strikes creating a national emergency. In my judgment, the diminished chance for legislative action in these fields—the difficulty of putting an acceptable package of Taft-Hartley amendments together now that the business lobby has secured its principal goals—is the most unfortunate consequence of the legislation.

Title VII of the Conference Report, which was adopted by both Houses and signed by the President,[20] deals with a number of subjects. Organized labor secured long-sought amendments: (a) repeal of the non-Communist affidavits, (b) expedited elections, (c) authority for pre-hire contracts in the construction industry, and (d) the right of replaced strikers to vote in an NLRB election held with-

16. S. 1555, 86th Cong., 1st Sess. § 708 (1959), as passed by Senate.
17. S. 1555, 86th Cong., 1st Sess. § 707 (1959), as passed by Senate.
18. H.R. 8342, 86th Cong., 1st Sess. (1959).
19. H.R. 8400, 86th Cong., 1st Sess. (1959).
20. Labor-Management Reporting and Disclosure Act of 1959, ch. —, 73 Stat. 519.

in a year of the commencement of the strike. The three other salient changes are discussed below.

II. Federal-State Relations

In the NLRA, Congress asserted federal jurisdiction over unfair labor practices and questions of representation which "affect" interstate commerce.[21] The Supreme Court held that the act impliedly excluded state courts and administrative agencies from the entire area.[22] The NLRB has always refused to hear some cases technically within its jurisdiction.[23] The interplay between this rule and the Supreme Court decisions created a no man's land in which employers and labor unions were left without a remedy for unfair labor practices or a method of resolving questions of representation.

There was unanimous agreement that this injustice should be eliminated. The dispute concerned the remedy.

The basic philosophy of the Democratic majority among the Senate conferees and also of Senator Prouty was that there should be one uniform national labor law for every business affecting interstate commerce. And although they would have preferred to have the NLRB administer the law, they would have considered it a fair compromise to allow the state labor boards and courts to apply the federal statute.

Meanwhile the House bill proceeded upon the following two principles: (1) State tribunals should hear and apply state law in all cases over which the NLRB declined to exercise jurisdiction. (2) The NLRB should have full discretion to determine which cases the federal government should deal with and which should be left to state authority.

The impact of the House bill would have depended upon the way in which the NLRB exercised this broad discretion. If it reverted to the Republican philosophy of ceding back to the states functions presently being exercised by the national government, as it had done in 1954,[24] there would be serious retrogression from the idea of a uniform national labor policy. Thirty-four states have no laws for conducting representation elections and do nothing to protect employees against discriminatory discharges and other unfair labor practices.

The Conference Report eliminated this danger by adding to the Landrum-Griffin bill a proviso reading:

21. Labor Management Relations Act §§ 9(c), 10(a), 61 Stat. 144, 146 (1947), 29 U.S.C. §§ 159(c), 160(a) (1952).

22. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).

23. *E.g.*, Liddon White Truck Co., 76 N.L.R.B. 1181 (1948).

24. NLRB Press Release No. 449, July 15, 1954.

> [T]he Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.[25]

This proviso writes at least ninety per cent of the Senate philosophy into the NLRA. The NLRB standards on August 1, 1959, embraced the widest jurisdiction in its history.[26] They go far beyond the 1954 yardsticks and substantially beyond 1950 standards. Under this amendment, therefore, labor unions enjoy greater protection for organizational activities and management greater protection against union unfair practices than was available on any occasion prior to October, 1958. Within this area, the existing doctrines of federal pre-emption are impliedly preserved.[27]

There is no reason to anticipate difficulty in the administration of the amendment. The Board may continue to apply existing standards, or broaden them if it wishes. Unfortunately, the amendment speaks of jurisdiction over "labor disputes," where it would have been more consonant with prior legislative and administrative terminology to speak of "unfair labor practices" and "questions of representation"; but it is obvious that these proceedings, and not true disputes, were what the Congress had in mind. I cannot imagine the Board or a court having any doubt upon the question.

The state courts will be free to apply state law in cases which do not meet the Board's jurisdictional standards. When a claim of pre-emption is raised in a concrete case, the state courts will be required to hear evidence concerning the size of the employer's business, so as to determine whether the NLRB would exercise jurisdiction under its published standards. It would be inconsistent with the general tone of congressional discussion to require a party to apply to the NLRB and have it decline jurisdiction before seeking relief in a local tribunal.

III. Organizational Picketing

The Landrum-Griffin amendments add a new union unfair labor practice in NLRA section 8(b)(7), which puts important restraints upon freedom to picket for recognition as the bargaining representative or for the purpose of inducing employees to join a union.[28] These restrictions are the inevitable consequence of ideas introduced into our national labor policy in the Wagner Act. An understanding

25. Labor-Management Reporting and Disclosure Act of 1959, ch.—, § 701, 73 Stat. —, introducing Labor Management Relations Act § 14(c).

26. NLRB Press Release No. 576, October 2, 1958.

27. Two of the many discussions of federal pre-emption in the field of labor law are Meltzer, *The Supreme Court, Congress, and State Jurisdiction of Labor Relations* (pts. 1 & 2), 59 Colum. L. Rev. 6, 269 (1959); and Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 (1954).

28. Labor-Management Reporting and Disclosure Act of 1959, ch.—, § 704(c), 73 Stat.—.

of the underlying philosophy is also helpful in resolving some of the difficulties of interpretation.

One cornerstone of national policy, the Norris-LaGuardia Act, deprived the federal courts of power to issue injunctions against the use of peaceful strikes, boycotts, or picketing as methods of securing recognition or extending union organization. The Wagner Act, by giving employees legally protected rights of self-organization and collective bargaining, made three fundamental changes in the premises supporting the Norris-LaGuardia Act.

(1) The Norris-LaGuardia view that the law had no useful role to play in labor disputes, unless there was violence or destruction of property, became untenable after legal restrictions were imposed upon the conduct of employers in relation to union organization. No civilized jurisprudence could tolerate the inconsistency of requiring a company to bargain exclusively with a union certified by law, while doing nothing to stop a rival union from injuring the same employer in order to secure exclusive recognition.

(2) The right to use concerted activities as a means of spreading collective bargaining was nourished by a broad *laissez fairé* philosophy. In competitive industries the nonunion employer and his employees were in constant competition with the union and its members. If concerted action was a legitimate weapon in what Holmes called "the free struggle for life," [29] as it came to be under the philosophy of the Norris-LaGuardia and Wagner Acts, it made little difference whether the unorganized employees joined a union because they wished to join, because the employer forced them to join in order to save his business, or because the power of the union to deprive them of jobs by shutting down the business left no viable alternative. Any sacrifice of their desires or of the employer's interests was a cost of one form of competition. [30] "Top-down organizing" is obviously inconsistent with the NLRA ideal of employee self-organization without interference by employers. A union's exertion of economic pressure upon employees may also be inconsistent with the ideal of freedom of choice.

(3) A union's need for economic weapons with which to extend its organization was reduced by the inhibitions which the Wagner Act imposed upon employers, and the force of an employer's claim to the protection of his business was increased.

The impact of the Wagner Act upon the use of strikes and picketing as organizing methods was first manifested in section 8(b)(4)

29. Vegelahn v. Guntner, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896) (dissenting opinion).

30. *E.g.*, Park & Tilford Import Corp. v. International Bhd. of Teamsters, 27 Cal. 2d 599, 165 P.2d 891 (1946); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927).

(C) of the Taft-Hartley Act, which provides that it shall be an unfair labor practice for a labor organization to induce employees to strike or to refuse to perform their normal services, with an object of requiring any employer to recognize or bargain with a particular labor organization, if another representative has been certified.

During the period for which a certification bars a new election, this prohibition is necessary to give effect to the will of the majority and to protect the employer against economic pressure intended to compel him to violate the law or to punish him for compliance. The cases holding that minority strikes and picketing are prevented by a prior certification for an indefinite period[31] carry the rule beyond its justification. Once the employer is relieved of the legal duty to bargain with the certified union, the only question is what techniques should be open to a union which may now lawfully seek to become the majority's choice.[32]

In one respect section 8(b)(4)(C) was obviously incomplete. A collective bargaining agreement with a representative freely designated by a majority of the employees in an appropriate bargaining unit bars an election for a reasonable period, usually two years.[33] Minority picketing for union recognition or organizational purposes during this period, like picketing during the first year of a certification, seeks to override the will of the majority and to compel the employer to violate his legal obligations. The Landrum-Griffin amendments fill the gap by making it an unfair labor practice to picket for such purposes

> where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

A certification carries a high degree of assurance that the incumbent union was the free majority choice. However, there is no such guaranty in a collective agreement. If the NLRB is content to be guided by the formal acts, section 8(b)(7)(A) may become a refuge for unscrupulous employers and racketeer unions. The words of the amendment, read with appreciation of its rationale, invite a more penetrating inquiry. They prohibit the picketing only if the employer recognized the union "lawfully" and "in accordance with this Act." It is unlawful and contrary to the act for an employer to recognize a union which has not been designated by a majority of the employees in an appropriate unit or which is the beneficiary of

31. Parks v. Atlanta Printing Pressmen & Assistant's Union No. 8, 243 F.2d 284 (5th Cir. 1957); Tungsten Mining Corp. v. District 50, United Mine Workers, 242 F.2d 84 (4th Cir. 1957); Tungsten Mining Corp., 106 N.L.R.B. 903 (1953).

32. See text beginning at note 38 *infra*.

33. 22 NLRB ANN. REP. 18–19 (1957).

an unfair labor practice.[34] A contract does not prevent raising a question of representation, unless the union had an uncoerced majority at the time the contract was signed and there was no conflicting claim to recognition.[35] Section 8(b)(7)(A) can be made an effective instrument for carrying out the basic policies of the act without damaging the legitimate interests of any bona fide union, if these questions are carefully investigated by the General Counsel and thoroughly litigated in the district court and the NLRB before an injunction or cease and desist order is issued.[36]

Read literally, section 8(b)(7)(A) would prohibit a union from picketing an employer in an effort to organize a unit of production workers, if the employer had a contract with another union covering a unit of maintenance workers. It also speaks too closely of inability to raise a question of representation under section 9(c), which might literally cover any case in which the union could not prove that thirty per cent of the members desired it to represent them. The rationale should make it clear that only the contract bar is material and that the prohibition does not go beyond picketing to organize, or to secure recognition in, a bargaining unit in which an election is barred by the outstanding agreement.

In both state decisions and NLRB reasoning there has been a tendency to distinguish picketing for recognition from organizational picketing.[37] The Landrum-Griffin amendments wisely ignore the purely verbal distinction and treat them alike. Apart from the provision mentioned above, the amendments rest upon two distinctions.

First, picketing in any form is treated as a legitimate organizing weapon until the employees have expressed their wishes in an NLRB election. Picketing is prohibited thereafter, except by a certified union, for the twelve-month period in which no new election could be held.[38] The prohibition of picketing after a majority vote "No Union" expands the notion of freedom of choice beyond the Wagner

34. Bernhard-Altmann Texas Corp., 122 N.L.R.B. No. 142 (Feb. 9, 1959).

35. 22 NLRB ANN. REP. 24 (1957).

36. There is no necessary inconsistency between the above interpretation and the amendment to NLRA § 10(1) which directs the regional attorney not to apply for a temporary restraining order if a charge has been filed against the employer under § 8(a)(2). The proviso is applicable to all subdivisions of § 8(b)(7) and represents a compromise between the view that there should never be a temporary injunction where the employer was charged with any unfair labor practice and the argument that this would put it in the power of unions to stall injunction proceedings indefinitely. The above interpretation deals only with § 8(b)(7) and would seem to rest solidly upon its words.

37. *E.g.*, Wood v. O'Grady, 307 N.Y. 532, 122 N.E.2d 386 (1954); Anchorage, Inc. v. Waiters & Waitresses Union, Local 301, 383 Pa. 547, 119 A.2d 199 (1956).

38. Labor Management Relations Act § 8(b)(4)(C), 61 Stat. 141–42 (1947), 29 U.S.C. § 158(b)(4)(C) (1952); Labor Management Relations Act § 8(b)(7)(B), Labor-Management Reporting and Disclosure Act of 1959, ch.—, § 704(c), 73 Stat.—. See text beginning at note 33 *supra*.

Act's guaranty of freedom to choose a collective bargaining representative into freedom to have none, for it guarantees freedom against the economic pressures of picketing as well as against interference by employers. This is an expansion of the concept of freedom of choice embraced by the Wagner Act, but it is necessary to prevent organized groups in key industries from using their often overwhelming economic power to attach other appropriate bargaining units as satellites. The Teamsters Union, for example, appears to have compelled employees to designate it as their bargaining representative against their wishes, threatening to use organizational picketing to destroy the business upon which their jobs depended. The national labor policy should encourage collective bargaining but not at the cost of permitting powerful groups to destroy the right of self-determination.

Banning organizational picketing after an NLRB election partially rejects the free struggle for life, for it prefers the nonunion employees' interest in self-determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. Suppose, however, that a union were to picket for the avowed purpose of publicizing the low wages paid in an establishment, without becoming the bargaining representative, in order to compel the owner to raise his wages to the union scale or else to prevent the distribution of the low-cost, nonunion goods in direct competition with the products of union labor. NLRA section 8(b)(7) prohibits picketing only

> where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or . . . the employees of an employer to accept or select such labor organization as their collective bargaining representative. . . .

The very few men close to the drafting of the Conference Report who understood this problem had no common intention — perhaps "had conflicting intentions" would be a better phrase. Presumably, the NLRB will follow the decisions under section 8(b)(4)(C) which hold that picketing in support of a demand which is customarily made in collective bargaining is picketing for recognition.[39] I am inclined to think that the decisions are wrong, and they are opposed by a few judicial rulings distinguishing picketing to protest the competition.[40] The prohibition seeks to protect the employees' decision concerning union representation, not their freedom to work

39. International Ass'n of Machinists, 121 N.L.R.B. No. 170 (Oct. 18, 1958); Teamsters Union, 115 N.L.R.B. 890 (1956).

40. International Bhd. of Carpenters v. Todd L. Storms Constr. Co., 84 Ariz. 120, 324 P.2d 1002 (1958); Standard Grocer Co. v. Local 406, AFL, 321 Mich. 276, 32 N.W.2d 519 (1948); *cf.* Douds v. Knit Goods Workers, Local 155, 147 F. Supp. 345 (E.D.N.Y. 1957).

at substandard wages without reprisal from those who are injured. The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the decision concerning union representation. The danger in distinguishing picketing to protest substandard wages or working conditions from picketing for union recognition or organization is that it may encourage verbal evasions through disingenuous phrasing of the pickets' placards and the union's demands. The best solution would be to treat the union's objective as a question of fact. Normally recognition or union organization are objectives of any picketing of an unorganized shop, but the force of this presumption, based upon experience, can be dissipated by proof that the labor conditions of which the union complains are presently such a substantial threat to existing union standards in other shops as to support a finding that the union has a genuine interest in compelling the improvement of the labor conditions or eliminating the competition, even though the union does not become the bargaining representative.

Picketing before a union election is divided by section 8(b)(7) into two categories: (1) picketing which halts pick-ups or deliveries by independent trucking concerns or the rendition of services by the employees of other employers, and (2) picketing which appeals only to employees in the establishment and members of the public. The distinction is in terms of consequences rather than intent, because motives are too difficult to disentangle. The theory is that the former class of picketing is essentially a signal to organized economic action backed by group discipline. Such economic pressure, if continued, causes heavy loss and increases the likelihood of the employer's coercing the employees to join the union. In the second type of picketing, the elements of communication predominate. If the employer loses patronage, it is chiefly because of the impact of the picket's message upon members of the public acting as individuals.[41] The NLRB, in administering section 8(b)(7), should recognize that the statute draws a line between two courses of conduct. Proof of a few widely separated instances of a trucker's refusal to cross a publicity picket line should not convert it into signal picketing.

Congress placed no limitation upon the period for which a union may engage in publicity picketing. Signal picketing is treated as a

41. This distinction between "signal picketing" and "publicity picketing" has been noted in discussions of the question whether picketing should be protected by the first and fourteenth amendments as a method of communication, but it attracted no significant judicial support. See Hughes v. Superior Court, 32 Cal. 2d 850, 871, 198 P.2d 885, 897–98 (1948) (Traynor, J., dissenting); Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591–97 (1951).

legitimate organizing tactic until the election has been held; but to prevent the union from avoiding an election by disclaiming, or avoiding a claim of representation rights, section 8(b)(7)(D) prohibits signal picketing for more than a reasonable period, not to exceed 30 days, without filing a petition upon which the NLRB is to proceed forthwith to an election. The signal picketing may then continue until the election is held. After the election, all picketing, signal or publicity, is forbidden for reasons explained above.

Section 8(b)(7) directs the NLRB to proceed "forthwith" when a petition for an election is filed because of organizational picketing. The immediate objective was to protect employers against prolonged picketing, but the provision giving regional offices authority to conduct elections without referring a case to the full Board manifests a broader purpose to speed up all elections.[42] No distinction should be made between employers' petitions and unions' petitions in the administration of section 8(b)(7)(C).

Under the *Curtis Bros.*[43] and *Alloy*[44] doctrines, the NLRB interpreted section 8(b)(1) to impose some restrictions upon organizational activities which are more severe than section 8(b)(7) provisions — the *Alloy* case, for example, forbids the organizing of a consumer boycott after an election even though there is no picketing, whereas section 8(b)(7) forbids only picketing — but in other instances section 8(b)(7) is the more restrictive. The final sentence of this section provides:

> Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under section 8(b).

Does this mean that the more severe restrictions imposed by the *Curtis* and *Alloy* doctrines survive under section 8(b)(1) *if* they are a proper interpretation of the statute? The words will bear this meaning. It would seem wrong, however, to interpret the vague words of section 8(b)(1) as a license for administrative and judicial construction of restrictions upon concerted activities as organizational techniques after Congress had sharply debated the issue and expressed its conclusions in section 8(b)(7). The troublesome sentence can equally well be read as a caveat intended to eliminate the risk that the new section 8(b)(7) would be taken to restrict the prohibitions upon secondary boycotts or jurisdictional disputes.

The Statement of the Managers on the part of the House provides:

---

42. See Labor-Management Reporting and Disclosure Act of 1959, ch.—, § 701(b), 73 Stat. —, amending Labor Management Relations Act § 3(b).

43. Drivers, Chauffeurs, & Helpers Local 639, 119 N.L.R.B. 232 (1957), *rev'd*, — F.2d —, (D.C. Cir. 1958), *cert. granted*, 359 U.S. 965 (1959).

44. International Ass'n of Machinists, 119 N.L.R.B. 307 (1957), *enforced in part and set aside in part*, 263 F.2d 796 (9th Cir. 1959), *petition for cert. filed*, 28 U.S.L. WEEK 3002 (U.S. April 24, 1959) (No. 57).

> Section 8(b)(7) overrules the *Curtis* and *Alloy* cases to the extent that those decisions are inconsistent with section 8(b)(7).[45]

If the reference to the *Curtis* and *Alloy* cases directs attention to the NLRB decisions, the Statement supports the argument that their more restrictive aspects survive. However, the circuit courts had reversed the NLRB, and the function of the Statement may be to explain that the court decisions are overruled to the extent that section 8(b)(7) forbids organizational picketing.

It may clarify the situation to recount the pertinent events. The ambiguous sentence in the statute was not overlooked. On the part of the Senate, the fear was expressed that it might keep alive the litigation over the *Curtis* and *Alloy* doctrines and thus lead to judicial and administrative restrictions in addition to those imposed by section 8(b)(7). The answer disclaimed such an intent, but the proponents of the Landrum-Griffin bill were unwilling to delete the sentence, for fear that the deletion might somehow be construed to imply that section 8(b)(7) qualified section 8(b)(4) or other provisions prohibiting unfair labor practices having nothing to do with the use of picketing or other publicity in an organizing campaign. The difference was resolved by the suggestion that the House Managers should include the following statement in their explanation of the Conference Agreement:

> The final sentence in proposed section 8(b)(7) is intended to make it clear that section 8(b)(7) does not qualify any of the other unfair labor practices under section 8(b). Section 8(b)(7) is, of course, intended as a definitive legislative disposition of the problems involved in the *Curtis* and *Alloy* cases.

This passage was mimeographed on a sheet containing two similar passages compromising other issues, distributed and read aloud at a later meeting of conferees with the staff present, and approved without dissent. The Statement of the House Managers had not been prepared when the Senate voted. It was not shown to the Senate staff. Instead of the agreed explanation, it contained the sentence quoted above. The meaning would be the same if the actual Statement means that the court decisions in the *Curtis* and *Alloy* cases are overruled where inconsistent with section 8(b)(7).

The treatment of organizational picketing in the bill compromises conflicting interests. Signal picketing is an economic weapon which may seriously injure an employer's business and exert sufficient economic pressure upon the employees to coerce their choice of representatives. It can be argued that such a method of organizing is unnecessary and inappropriate today because the NLRA prevents coercion by employers. On the other hand, the union members have an important economic interest in protecting their wages and work-

45. 105 CONG. REC. 16552 (daily ed. Sept. 3, 1959).

ing conditions. The protection against employer interference available under the NLRA is imperfect, because of the delays and uncertainties of litigation, the manifold opportunities for subtle discrimination, and the coercion exercised through freedom of expression. Since all unionization involves a revolution against the established order, the demonstration that there is another power factor in the situation may be essential to spark the revolt. The relative weights assignable to these considerations vary from case to case — there are instances in which two days of organizational picketing is an outrage and others in which a year of picketing would be beneficial — yet the necessary appraisals are too particularized for practical administration. One's final judgment depends partly upon the degree of his reluctance to curtail a weapon of self-advancement and partly upon his appraisal of the value of further unionization. In my opinion, section 8(b)(7) strikes as fair a balance as has yet been suggested, provided that the inadequacies of the draftsmanship are remedied by understanding administration.

IV. Secondary Boycotts

The Landrum-Griffin bill makes extensive and important changes in the law pertaining to secondary boycotts and "hot cargo" agreements. One group of changes closes technical loopholes in the Taft-Hartley Act. A second expands the prohibition upon secondary boycotts to include the organization of primary boycotts among business firms. The third revision extends the Taft-Hartley prohibition against inducing secondary refusals to work to include inducing secondary refusals to patronize.

(1) There was complete agreement about closing the technical loopholes if the legislation included Taft-Hartley amendments. In its original form, section 8(b)(4)(A) prohibited inducement of

> "the employees of any employer to engage in a strike or a concerted refusal in the course of their employment. . . ."

This provision did not apply to the inducement of railroad, airline, and public employees, or supervisors, because they are not technically "employees" as defined by section 2(2), or to inducement of an individual, because the plural form, "employees," was used. But section 8(b)(4)(A), as revised, prohibits the inducement of

> "any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment. . . ."

These words obviously encompass the groups heretofore inadvertently excluded.

(2) The sharpest controversy revolved around the expansion of section 8(b)(4)(A) into a prohibition of certain primary activities.

Historically, a boycott is a refusal to have dealings with an offending person. To induce customers not to buy from an offending grocery store is to organize a primary boycott. To persuade grocery stores not to buy Swift products is also a primary boycott. In each case the only economic pressure is levelled at the offending person—in terms of labor cases, at the employer involved in the labor dispute.

The element of "secondary activity" is introduced when there is a refusal to have dealings with one who has dealings with the offending person. For example, there is a secondary boycott when housewives refuse to buy at any grocery store which deals with Swift & Co. For members of the Plumbers Union to refuse to work for any contractor who buys pipe from the United States Pipe Co. is, strictly speaking, a secondary strike but is called a secondary boycott and is, of course, the only kind of secondary activity which was prohibited under the Taft-Hartley Act. Thus, there are two employers in every secondary boycott resulting from a labor dispute.

Picketing at the scene of a labor dispute often requires the drawing of fine distinctions between primary and secondary activities. NLRA section 8(b)(4)(A) obviously makes it unlawful for the Teamsters Union to induce the employees of the ABC Express Co. to refuse to transport furniture delivered at the ABC terminal by the Modern Furniture Co., some of whose employees are on strike, for one of the Teamsters Union's objectives would be to force the express company to cease doing business with the furniture company. Suppose, however, a second case, where the furniture company telephones the express company to pick up the furniture at the factory, but the strikers dissuade the express company's drivers from entering. The refusal to cross the picket line, not the strike, applies the economic pressure. The words of section 8(b)(4)(A) are equally as applicable as in the first case, but the NLRB and lower court decisions have held that in the second case there is no violation of the Taft-Hartley Act, chiefly because turning people away from the scene of a labor dispute is an incident of a primary strike rather than of a secondary boycott.[46] The Supreme Court also adopted this interpretation in the *Rice Milling* case, but the opinion stressed the point that section 8(b)(4)(A) prohibited inducements to engage in a "concerted refusal."[47] Since the Landrum-Griffin bill deleted this phrase, it might have overturned the entire line of decisions. A majority of the Senate conferees secured the inclusion of explicit language safeguarding primary picketing even though truck drivers are stopped by the pickets.

46. 21 NLRB ANN. REP. 111–12 (1956).
47. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

Suppose that prior to the strike at Modern Furniture Co. the Teamsters Union had induced all the trucking concerns in the area to agree that they would not require their employees to handle the goods of an employer engaged in a labor dispute. Would it now be an unfair labor practice for the Teamsters Union to induce the express company's employees to refuse to handle the furniture? For six or seven years these "hot cargo" contracts were held to legitimatize the secondary boycott,[48] but in 1957 the Supreme Court held that the clause was not the basis of a valid defense.[49] If the trucker performed his promise voluntarily, without the Teamsters Union inducing his employees not to work, there would be only a primary boycott and no violation of the Taft-Hartley Act.

Many observers felt that this was an impractical distinction. The effect upon the furniture company is the same as if the trucker did not carry the goods because the union induced his employees to refuse to handle them. Furthermore, one wonders about the trucker's "voluntary" participation in the primary boycott. Would he sign the "hot cargo" clause except under pressure from the Teamsters Union? Is it not likely that he would perform it only because he feared that if he did not the Teamsters Union might be more demanding in the next contract negotiations, or might remind the trucker of his failure to perform his part of the contract whenever he asked the union to halt a wildcat strike? The only way of dealing with such pressures is to nip them in the bud by prohibiting the agreements. Apart from the participation of the labor union, even as primary boycotts such agreements would violate the Sherman Act.[50]

This was the theory upon which the Senate voted to outlaw "hot cargo" contracts in the trucking industry. In the House the prohibition was expanded to all agreements by which an employer agrees with a labor organization not to handle or use the goods of another person. The fear has been expressed that the prohibition would invalidate agreements sanctioning conduct like the refusal of the truck drivers to cross the picket line at our hypothetical Modern Furniture Co. plant. However, the rationale of the new law points to a narrower interpretation. Section 8(b)(4)(A) refers to all inducements of employees of a secondary employer which are directed toward forcing him "to cease using, selling, handling, transporting or otherwise dealing in the products of any other

48. International Bhd. of Teamsters, 87 N.L.R.B. 972 (1949), *aff'd*, 195 F.2d 906 (2d Cir. 1952).

49. Local 1976, Int'l Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958).

50. Boycotts appear to be per se violations of § 1 of the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958). See Fashion Originators Guild v. FTC, 312 U.S. 457 (1941).

producer, processor or manufacturer, or to cease doing business with any other person." But under the *Rice Milling* case and the new confirmatory proviso, as explained above,[51] it does not constitute an unlawful secondary boycott to induce employees to refuse to cross a primary picket line where the refusal causes the secondary employer to cease doing business with the primary employer *at the site of the labor dispute.* The same words are repeated in outlawing "hot cargo" agreements. The prohibition was drafted in aid of the restriction upon secondary boycotts. The same distinction based upon the situs should therefore be observed, with the result that section 8(e) would not prohibit agreements sanctioning refusal to cross a lawful primary picket line.

Although the language leaves doubt, the underlying rationale should also exclude from section 8(e) conventional restrictions upon subcontracting such as the promise that

> all work that is usually performed in the plants of the Company shall continue to be performed in such plants unless a change is mutually agreed upon by both parties.

In a literal sense this clause is an agreement between an employer and a union by which the employer undertakes not to do business with any other person, but it has a different function from the contracts which were the targets of section 8(e). A restriction upon subcontracting which seeks to protect the wages and job opportunities of the employees covered by the contract, by forbidding the employer from having certain kinds of business done outside his own shop, is quite different in purpose and effect from blacklisting specified employers or groups of employers because their products or labor policies are objectionable to the union. The fact that Congress rejected the attacks upon the secondary boycott provisions of the Landrum-Griffin bill which alleged that the bill unwisely threw doubt upon the validity of bona fide restrictions upon subcontracting, may be attributed to disbelief in the allegation just as easily as to congressional opposition to contractual restrictions upon managerial freedom to subcontract, although there were undoubtedly individuals who hoped also to resolve the subcontracting issue in favor of management. Whatever the merits of the latter issue, it is distinct from the only explicit subject of legislative concern.

The prohibition of "hot cargo" contracts is the most vulnerable of the Landrum-Griffin amendments. In the trucking industry, it will serve a useful purpose. The apparel and clothing industries were excepted, because there the prohibition would have raised havoc. Congress had no information about the prevalence or use

51. See text following note 47 *supra.*

of similar clauses in other industries — about their impact upon employers or their importance to union organization. The majority was content to make the loose assumption that a clause which was contrary to public policy in the transportation industry must be equally undesirable in other segments of the economy.

(3) The other major change in the law of secondary boycotts is the partial restriction of consumer boycotts. Section 8(b)(4)(A) of the Taft-Hartley Act forbade only the inducement of "employees" to engage in a concerted refusal to work "in the course of their employment." The amendments make it unlawful "to threaten, coerce or restrain any person" where an object is to force him to cease doing business with any other person.

Standing alone, as it did in the Landrum-Griffin bill, this language seemed to invite rulings that organizing a consumer boycott of a store which sold the products of a manufacturer with whom the union was engaged in a labor dispute would become an unfair labor practice. A majority of the Senate conferees objected to this change in the law. There is some reason to think that originally the Republicans and Southern Democrats among the House conferees failed to realize that the words were broad enough to reach consumer boycotts and would have agreed to eliminate the prohibition, but President Eisenhower's radio and television appearance placed them in a dilemma. The speech contained an example of secondary picketing which had either to be read as an inducement of employees to engage in a secondary strike, in which case the President had displayed ignorance by demanding that Congress outlaw conduct which had been unlawful for twelve years, or as a demand for a law against picketing which caused a secondary consumer boycott. The sponsors of the Landrum-Griffin bill stood immovably upon the second alternative. The Senate conferees, therefore, sought to narrow the restriction to the exact illustration used by the President. This is the reason for the proviso which permits unfair lists, radio broadcasts, newspaper advertising, sound trucks and every other form of publicity except picketing, for the purpose of inducing consumers to boycott an unfair product or a distributor who does business with an unfair producer. The qualification is justified by the distinction which we noted in section 8(b)(7) between appeals to individuals as members of the public, whether union members or not, and concerted refusals to work backed by the pressure and possibly by the discipline of an organized group. I suspect that the distinction between signal and publicity picketing would also have been introduced if it were not for the curious turn of events which made this politically impossible for the sponsors of the Landrum-Griffin amendments.